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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. [redacted]/133

THE CLEMSON AGRICULTURAL COLLEGE OF SOUTH CAROLINA, ET AL., *Petitioners,*

v.

HARVEY B. GANTT, a minor, by his father and next friend, Christopher Gantt, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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May 15, 1963.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioners herein[1] pray that a writ of certiorari issue to review the judgment of the United States

[1] The petitioners include The Clemson Agricultural College of South Carolina; R. M. Cooper, President of the Board of Trustees of The Clemson Agricultural College of South Carolina; Edgar A. Brown, James F. Byrnes, Charles E. Daniel, Winchester Smith, Robert R. Coker, James C. Self, Paul Quattlebaum, Jr., W. Gordon McCabe, Jr., A. M. Quattlebaum and L. D. Holmes, Members of the Board of Trustees of The Clemson Agricultural College of South Carolina; and Kenneth N. Vickery, Registrar of The Clemson Agricultural College of South Carolina.

Court of Appeals for the Fourth Circuit entered in this case on January 16, 1963.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fourth Circuit, entered on January 16, 1963, has not yet been reported. It is reprinted in Appendix A hereto, p. 1a, *infra*.

The opinion of the United States District Court for the Western District of South Carolina was issued and filed on December 21, 1962, and is reported at 213 F. Supp. 103. It is reprinted in Appendix B hereto, p. 7a, *infra*.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on January 16, 1963. No petition for rehearing was filed. On April 3, 1963, the Chief Justice of the United States signed an order extending the time for filing this petition for writ of certiorari to and including May 15, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether, under Rule 23(a)(3), Fed. Rules Civ. Proc., a class suit may be maintained and a class injunction issued where, in a suit claiming racial discrimination against a Negro applicant for admission to a state college, there is no proof of an identifiable class of other Negro applicants and where the highly individualized qualifications for college admission make a common question of law or fact impossible to formulate.

FEDERAL RULE OF CIVIL PROCEDURE INVOLVED

Rule 23. Class Actions.

(a) Representation. If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is

(1) joint, or common, or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it;

(2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or

(3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought.

STATEMENT OF THE CASE

The respondent Gantt, through his father, filed this suit in the United States District Court for the Western District of South Carolina on July 7, 1962, under 28 U.S.C. § 1343(3). He alleged that he was a Negro citizen of the State of South Carolina, a high school graduate and therefore eligible to apply for admission to The Clemson Agricultural College of South Carolina. He further alleged that he was fully qualified for such admission, had filed the necessary applications and had met all the admission requirements, but had been denied admission "solely because of the race and color of plaintiff and pursuant to the policy, prac-

tice, custom and usage of limiting admissions to Clemson College to white persons only.". The denial of admission on that basis was said to violate rights "secured to him by the Constitution and laws of the United States" within the scope of 28 U.S.C. § 1343(3).[2] R. 1a-9a.

The complaint also stated that this was a class action brought on behalf of respondent Gantt and on behalf of "all other Negro residents in the State of South Carolina who are similarly affected and restricted by the policy, practice, custom and usage complained of herein." The members of this class were said to be so numerous as to make it impracticable to determine all of the members of the class and to bring them each individually before the court; there was said to be "a common question of law and fact involved in this case which affects the plaintiffs and all of the members of the class alike, and common relief is sought by the minor plaintiff for himself and for all members of the class." R. 3a-4a.

The complaint sought not only an order to admit the respondent Gantt to Clemson College for the school term beginning in September, 1962, but also an injunction enjoining "the policy, practice, custom and usage of excluding all qualified Negroes from Clemson College." R. 7a.

Simultaneously with the filing of the complaint, a preliminary injunction was sought to enjoin the officials

[2] Federal district courts are given original jurisdiction by 28 U.S.C. § 1343(3) over civil actions to redress the deprivation, under color of any state law, custom or usage, of any right, privilege or immunity secured by the Constitution or any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

of Clemson College from refusing to consider the applications of the respondent Gantt and other Negro residents of South Carolina for admission to Clemson College "upon the same terms and conditions applicable to white applicants seeking admission to said college." R. 10a. This injunctive request also went to what was described as the failure to act expeditiously upon applications received from Negro residents of South Carolina solely because of their race and color, and to the subjection of Gantt and other Negro applicants "to requirements, prerequisites, interviews, delays and tests not required of white applicants for admission." R. 10a.

An answer was duly filed by the petitioners herein. R. 15a-21a. All allegations as to discriminatory practices and denials of admission with respect to Negro applicants were denied. The answer further denied that respondent Gantt's application to transfer to Clemson College from Iowa State University had been denied, it being alleged that Gantt had failed to supply all the requested information that was necessary to process his application. A specific denial was made that this suit could properly be termed a class action "in that no other person, whose situation is similar to that of the Plaintiff, has applied for admission to Clemson College." R. 20a.

Following a hearing, the District Court denied the motion for a preliminary injunction. R. 191a-203a; 208 F. Supp. 416. The court was unable to find from the evidence submitted whether there had been any discriminatory action in the consideration of respondent Gantt's application, the record being barren as to the treatment accorded other like applications. The court did find, however, "that no application of the

plaintiff for enrollment as a student at Clemson College has been denied," one application having been properly cancelled and another being incomplete. R. 198a. With respect to the class action aspects of the preliminary injunction request, the court found, R. 196a, that

> . . . the record before me does not relate to any negro other than the plaintiff's application for admission to Clemson College. Plaintiff failed to develop through the deposition of the Registrar or the testimony of the President of the College any evidence that any other negro person is in a situation in any way similar to that of the plaintiff.

The order denying the motion for a preliminary injunction was appealed to the Court of Appeals for the Fourth Circuit. That court, on October 5, 1962, after hearing full argument, declined to disturb the District Court order on the assurance that the case on the merits would be expedited in the District Court. See pp. 2a, 7a-9a, *infra*.

The case then proceeded to a trial on the merits before the District Court, resulting in the opinion and judgment on December 21, 1962, dismissing the complaint. Appendix B hereto, p. 7a, *infra*. The court there concluded that the respondent Gantt had failed to prove the material allegations of his complaint, that he had failed to comply with the rules and regulations for admission to Clemson College, that he had failed to complete his application, that he had not been denied admission to Clemson College on any ground, and that he had not been denied admission to Clemson College on account of his race. More specifically, the court found that "At the time this action was commenced

Clemson College had not refused to admit plaintiff as a student to Clemson College on account of his race or on account of any other facts charged against the college." See p. 18a, *infra*. The detailed facts which led to that conclusion are stated at length in the opinion.

The District Court noted that, while the Legislature of South Carolina had indicated a policy of discouraging integration in state colleges, there is no statute now in existence which purports to make it illegal to admit respondent Gantt as a student at Clemson College. The court made it plain that if the evidence had demonstrated that respondent Gantt or any other Negro had made an application at Clemson and had met all the admission requirements "he could not legally be denied admission because of his race, and in such case it would be the duty of this court to order his admission." See p. 12a, *infra*. But, based upon the evidence as to the treatment accorded Gantt's application in comparison with that accorded other applications for admission, the court could find no discrimination against Gantt because of his race; nor could it find that his transfer application had been treated differently from those of about fifty white transfer applicants.[3]

The Court of Appeals reversed the order of the District Court and directed that the respondent Gantt be admitted to Clemson College "commencing with the opening of the next semester" since "his qualification for admission is unquestioned." The court found substantial evidence to support the District Court's finding that the cancellation of Gantt's first application

[3] The only exception related to the admission of a transfer student from the University of Florida, the evidence showing "that the college had good reason for her admission." See p. 19a, *infra*.

"was not discriminatory" and it further held that "the District Court was technically correct in holding that, at the time this action was commenced, Gantt's application had not been denied" but had simply not been "acted upon either way." Nevertheless, the Court of Appeals felt that under all the circumstances Gantt's second application should have been processed through to completion.

In so ruling, the Court of Appeals did not find that any of the requirements for admission by transfer to Clemson College were unreasonable, even when applied to Gantt. The court did note that the legislative policy of South Carolina discouraging racial integration in its schools was "unacceptable" under the Constitution of the United States, a factor which the court felt gave Gantt reason to believe that his effort to transfer to Clemson College might be unavailing without instituting legal proceedings. But the court did not find that this "unacceptable" policy underlay the actions of the Clemson College officials in this instance. It merely said that the suspension of the processing of the application could not be justified by the institution of this suit by Gantt, motivated as it was by Gantt's belief as to its necessity.

The Court of Appeals further held that this was a class action and that the District Court erred in failing to grant appropriate injunctive relief in light thereof. In the words of the court, p. 6a, *infra*:

> The action was brought by the plaintiff not only for his own benefit, but on behalf of other Negro citizens of South Carolina similarly situated. This procedure is entirely proper under Rule 23(a)(3) of the Federal Rules of Civil Procedure. Other Negroes have in the past sought admission to

> Clemson, and doubtless there are other qualified Negroes who will do so. These, as well as Gantt, are entitled to freedom from a racially discriminatory policy.

No mention was made by the Court of Appeals of the earlier determination of the District Court, R. 196a, that Gantt's evidence had failed to establish that any other Negro "is in a situation in any way similar to that of the plaintiff."

Subsequent to the entry of the Court of Appeals judgment, the respondent Gantt has in fact been admitted to Clemson College in compliance with the injunctive decree. The class action injunction remains outstanding.

REASONS FOR GRANTING THE WRIT

The decision below as to the availability and propriety of class action relief in this type of proceeding raises important and unresolved issues meriting plenary review by this Court. The absence of any meaningful guidelines in Federal Civil Rule 23(a)(3) for dealing with these problems in the context of racial discrimination suits has led to differing results in the lower federal courts. Indeed, the difficulties inherent in this situation have created direct conflicts between the decision below and applicable decisions of this Court and of at least one other federal appellate tribunal.

A. Defining the Class

The Court of Appeals below defined the class in the conclusionary words of the complaint—"other Negro citizens of South Carolina similarly situated." But the court did not purport to overrule the determination of the District Court, R. 196a, that the evidence

failed to establish that any other Negro in South Carolina "is in a situation in any way similar to that of the plaintiff." There was no determination that such finding was clearly erroneous in the light of proof that other Negroes in South Carolina had in fact been qualified and had sought admission to Clemson College. No such proof existed. Nor was there any evidence whatever that other qualified Negroes "doubtless" will make application to Clemson College in the future.

In the absence of proof of applications by other qualified Negroes resident in South Carolina, a substantial question is raised as to the existence of a identifiable class for purposes of class relief. This Court recently made plain that where the existence of a class depends upon some type of action that associates a person with the class, such action is not to be presumed; it must be demonstrated by proof. In *International Association of Machinists* v. *Street*, 367 U.S. 740, 774 (1961), a class action suit had been brought on behalf of all employees who objected to a union shop assessment devoted to political purposes. A class action was held to be improper "for there is no attempt to prove the existence of a class of workers who had specifically objected to the exaction of dues for political purposes. See *Hansberry* v. *Lee*, 311 U.S. 32, 44." This Court concluded, 367 U.S. at 774, "that only those who have identified themselves as opposed to political use of their funds are entitled to relief in this action." See also *Scott* v. *Donald*, 165 U.S. 107, 115 (1897). As applied to the instant case, the *Street* doctrine means that only those Negroes in South Carolina who have identified themselves as fully qualified for admission to Clemson College are entitled to relief in this action. No such identification having been

proved, the class injunction must fail. See *Brotherhood of Clerks* v. *Allen*, No. 316, Oct. Term 1962, slip opinion, pp. 2, 3, 5, especially footnote 4 (May 13, 1963), where the *Street* doctrine as to class actions was reaffirmed and applied.

The determination below that class relief is proper despite the absence of an attempt to prove the existence of a class of Negro applicants qualified to enter Clemson College is thus in clear conflict with the principle announced in the *Street* case. The fact that compliance with college entrance qualifications is so highly an individual matter, as the particular facts in this case demonstrate, only heightens the difficulty of defining the class. Proof, not assumptions, is all the more necessary in making that definition.

B. Defining the Common Question

To justify relief in favor of a definable class, Rule 23(a)(3) calls for "a common question of law or fact affecting the several rights" of the given class. The heart of the problem in racial discrimination class suits concerns the existence of such a common question. That common question may be difficult to identify in light of the personal nature that attaches to many of our constitutional rights. See *Missouri ex rel. Gaines* v. *Canada*, 305 U.S. 337, 351 (1938); *Sweatt* v. *Painter*, 339 U.S. 629, 635 (1950); *Brown* v. *Board of Trustees*, 187 F. 2d 20, 25 (C.A. 5, 1951).

As stated in 2 Barron & Holtzoff, Federal Practice and Procedure, § 562.1, pp. 268-270 (Wright ed. 1961), "The availability of class actions in matters involving racial discrimination has led to some difficulty" and has created a distinction "between cases challenging a policy discriminatory against an entire group and

cases in which it is claimed that a policy, nondiscriminatory on its face, has been applied in a discriminatory manner to a particular individual or individuals." In the latter type of cases, class action is generally considered improper.

Thus where the suit challenges the validity of a state statute or policy that on its face discriminates against an entire group on the basis of race or color, the common question seems clear and the propriety of a class action is indisputable. Such a statute or policy defines both the class and the common question. See, e.g., *Evers* v. *Dwyer*, 358 U.S. 202 (1958); *Sharp* v. *Lucky*, 252 F. 2d 910 (C.A. 5, 1958).[4]

But where state policies are challenged which are not on their face discriminatory but may have been applied to the plaintiff in a discriminatory manner, more difficult problems are presented. Can the right of the individual plaintiff to be free of discriminatory application of a nondiscriminatory policy be merged into the more general right of a class? Does the common question relate to the nondiscriminatory policy or to its potential application to individuals on a discriminatory basis?

It is within this difficult area that the instant case falls. What started out in the complaint as a general challenge to the validity of an undefined state policy barring admission of all Negroes to Clemson College

[4] In the *Evers* case, a Tennessee statute requiring segregated seating in public transportation adequately defined the racial class for purposes of a class suit. In *Sharp* v. *Lucky*, the action of a voting registrar in refusing to deal with a Negro lawyer in a public room or office because of his color in itself defined the class as all having "an identity of interest in having access to the public offices of the Parish on a non-segregated basis." 252 F. 2d at 913.

has been limited by the proof and by judicial decision to nothing more than a legitimate objection to a discriminatory application of reasonable admission requirements of Clemson College. Such discriminatory application was not found to reflect any general anti-Negro policy of South Carolina; the state policy discouraging integration which the Court of Appeals held to be "unacceptable" related only to the justification of Gantt's belief in the need for institution of this suit, not to the actions of the Clemson College officials. The Court of Appeals ordered Gantt admitted to Clemson College only because it found that under all the highly individualized circumstances Gantt was fully qualified and no legitimate reason existed for not processing his application through to completion.

In such a context, a class action with class relief seems highly improper. What justified Gantt's admission to Clemson College were his own individual qualifications, matters which are necessarily unique to him and foreign to any one else. There was no "common question of law or fact" which justifies the admission of Gantt as well as of all other Negro applicants in South Carolina. Individual qualifications remain decisive.

Thus emerges a direct conflict between the decision below and that of the Fifth Circuit in *Reddix* v. *Lucky*, 252 F. 2d 930, 938 (1958).[5] In *Reddix* the court held a class action improper to challenge the action of a registrar in striking many Negroes from the voting lists as illegally registered, since the right of each voter would depend upon the actions taken with regard to

[5] The decision in the *Reddix* case was made by the same court, and on the same day, that rendered the decision in *Sharp* v. *Lucky*, see footnote 4, *supra*.

his particular case. "The fact that each voter must allege and prove the circumstances that might add up to an illegal purge," said the court, "makes it inappropriate, if not impossible, for a single plaintiff to represent them in a class action." And so in the instant case, the fact that each Negro applicant to Clemson College must allege and prove his own qualifications and the circumstances adding up to a discriminatory denial of admission "makes it inappropriate, if not impossible, for a single plaintiff to represent them in a class action." These two decisions, in short, are irreconcilable.

CONCLUSION

For these various reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Counsel for Petitioners

Of Counsel:

EUGENE GRESSMAN

May 15, 1963.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 8871

HARVEY B. GANTT, a minor, by his father and next friend, Christopher Gantt, *Appellant*,

versus

THE CLEMSON AGRICULTURAL COLLEGE OF SOUTH CAROLINA, a public body corporate; R. M. COOPER, President of the Board of Trustees of The Clemson Agricultural College of South Carolina; EDGAR A. BROWN, JAMES F. BYRNES, CHARLES E. DANIEL, WINCHESTER SMITH, ROBERT R. COKER, JAMES C. SELF, PAUL QUATTLEBAUM, JR., W. GORDON MCCABE, JR., A. M. QUATTLEBAUM, and L. D. HOLMES, Members of the Board of Trustees, etc., *Appellees*.

Appeal from the United States District Court for the Western District of South Carolina, at Anderson, C. C. Wyche, District Judge.

(Argued January 9, 1963 Decided January 16, 1963.)

Before SOBELOFF, *Chief Judge*, and SOPER and HAYNSWORTH, *Circuit Judges*.

Mathew J. Perry and Constance Baker Motley (Jack Greenberg, Lincoln C. Jenkins, Jr., Donald James Sampson, Willie T. Smith, Jr., and Derrick Bell on brief) for Appellant, and William L. Watkins (Watkins, Vandiver, Freeman & Kirven, and P. H. McEachin on brief) for Appellees.

PER CURIAM:

Harvey B. Gantt, a nineteen-year-old Negro resident of Charleston, South Carolina, is presently enrolled as a student in the Architectural School of Iowa State University. Since January, 1961, he has been seeking, without success, admission to Clemson College, the only institution in his native state that offers architectural courses.

In October 1962, we heard his appeal from the District Court's denial of an interlocutory injunction and an order admitting him to Clemson College. We declined to grant the desired relief at that stage of the proceedings, but, with the cooperation of the parties, the case was advanced and heard on the merits in the District Court and expedited on appeal when that Court dismissed Gantt's complaint.

Gantt first applied for admission to Clemson College in January 1961. The incomplete application was first denied upon the ground that it appeared that he was doing satisfactory work at Iowa State University which he was attending. Renewed, it was again cancelled on August 31, 1961 for the reason that his College Board Test scores, received the preceding day, were received too late to permit consideration of his application. He did not take the examination until August, though one had been given in Charleston, where he lived, in late June 1961. On August 31, 1961 some fifty transfer applications were cancelled for similar reasons. Under the circumstances, the finding of the District Court that the August 31, 1961 cancellation of Gantt's application was not discriminatory is supported by substantial evidence.

Thereafter Gantt reapplied for admission to Clemson College for the 1962-63 session. That application was formally completed in June 1962 when the transcript of his credits earned at Iowa State for the Spring Quarter of 1962 was received by Clemson College. Though not a formal catalog requirement, however, the evidence indicates that in the School of Architecture at Clemson College the accent

is upon original design work, and the Dean of that School routinely requires of transfer applicants submission of examples of their design work and a personal interview. The Dean wrote to Gantt asking that he submit a portfolio of his drawings for evaluation and that he come to Clemson for an interview with the Dean. When Gantt received this communication, however, he had already verified the complaint in this action and had authorized his attorney to file it. After this action had been filed, he responded to the Dean's letter, expressing a willingness to comply with the Dean's request, but, inquiring whether the Dean wished him to do so, in light of the fact that the action had been commenced. The Attorney for the College responded to Gantt's Attorney that he felt any further communication should be between counsel for the parties and not between the parties themselves.

The District Court, in its findings of fact, declared that the legislative policy of South Carolina does not prohibit, but discourages, integration of the races in its state-supported colleges. The distinction drawn between prohibition and discouragement is a novel one in legal literature, and we must hold it unacceptable. Under the Constitution of the United States a State may no more pursue a policy of discouraging and impeding admission to its educational institutions on the ground of race than it may maintain a policy of strictly prohibiting admissions on account of race.

The record shows that Clemson College, since the decision of Brown v. Board of Education, 347 U. S. 483 (1954), has not done anything to change the pre-existing policy of exclusion of Negroes as theretofore commanded by state statutes which that decision invalidated. The only state-supported institution of higher learning for Negroes is maintained by South Carolina at Orangeburg. The State has continued as theretofore its policy and practice of offering financial assistance to Negro students to help pay for their education in out-of-state institutions of learning, if

the courses they desire to take are not offered at Orangeburg, but they have not been admitted to other state institutions in South Carolina. Since no architectural courses are available at Orangeburg, Gantt has been receiving, in accordance with the prevailing practice, financial assistance from the State as a student of architecture at Iowa State University.

To require a Negro in all respects eligible for admission to a college maintained by the state to forego attendance there and to attend an out-of-state college, even with a state subvention, is not a satisfaction of his constitutional right to equal treatment without regard to race. It is not even compliance with the pre-existing separate but equal rule antedating Brown v. Board of Education. University of Maryland v. Murray, 169 Md. 478, 182 A. 590 (1936); Missouri Ex Rel. Gaines v. Canada, 305 U. S. 337 (1938).

There is no suggestion in the record that Gantt fails to meet the scholastic requirements entitling him to transfer to Clemson College. He has undergone the customary college admission tests. He has submitted to Clemson's authorities, and they have declared satisfactory, his record of studies at Iowa State University. Indeed, as noted, the reason given by Clemson's admissions officer for rejecting Gantt's initial application in early 1961 was that he was getting along satisfactorily at Iowa State University. He has also furnished the required certificate that he is in good standing at Iowa. The only failure attributed to him is that he has not submitted a portfolio of design work done by him at Iowa State University. However, there is a clear explanation for this failure. Finding himself, after eighteen months of effort, still unable to obtain admission to Clemson, Gantt instituted his action in the District Court. In response to a direct inquiry, the admissions officer declined, for that avowed reason, Gantt's offer to submit the portfolio, and Gantt was told that all further communications should be between the attorneys. In the circumstances, his failure to submit the portfolio may not

be relied on by the College. A person may not be penalized with forfeiture of his constitutional rights for asserting them in court.

Clemson's request that Gantt submit examples of his work in architectural design and come to Clemson for a personal interview with the Dean of the Architectural School were not unreasonable. As the Dean stated in his letter to Gantt, however, those requirements go principally to an evaluation of the previous work of the applicant, the credit he is to receive for his previous work and a determination, with respect to original design work, of the class within which he should be placed in Clemson. Such evaluation of his proficiency and achievement in design appears more closely related to his placement after admission than to his eligibility for admission.

It thus appears that the District Court was technically correct in holding that, at the time this action was commenced, Gantt's application had not been denied. It was being considered, but it had not been acted upon either way.

It may also be true that ordinarily the officials of a college ought to be allowed to pass upon applications free of the coercive effect of a pending action against them, but though the officials of Clemson College may have intended to pass upon Gantt's application on a fair and nondiscriminatory basis, it should have been readily understandable by them that Gantt, with reason, may not have thought so. In the light of the State's policy of discouragement of such transfers, as found by the District Judge, and in the absence of any assurance whatever by officials of the College, though they do not question Gantt's qualifications for admission, Gantt had justifiable reason to believe that, without legal proceedings in aid of his application, his effort to gain a transfer to Clemson College would be unavailing.

Under all of these circumstances, the College should not have shut off Gantt's effort to comply with the request

of the Dean of the School of Architecture for submission of examples of his design work, nor should it be allowed to justify its failure to grant the application because of Gantt's failure to submit drawings which the College refused to receive, or because of his effort to enforce his constitutional rights.

For the foregoing reasons, Gantt's admission to Clemson College, commencing with the opening of the next semester, will be ordered, for his qualification for admission is unquestioned. The injunctive order will require only that he be treated as any other transfer student.

Failure to rule that this was a class action and to grant appropriate injunctive relief was also error. Frazier v. University of North Carolina, 134 F. Supp. 589 (M.D.N.C. 1955), affirmed 350 U. S. 979; Williams v. Kansas City, 104 F. Supp. 848 (W.D. Mo. 1962), affirmed 203 F. 2d 47 (8th Cir. 1953), cert. den. 346 U. S. 826; Brunson v. Board of Trustees, Clarendon County School Dist. No. 1, 311 F. 2d 107 (4th Cir. Dec. 7, 1962). The action was brought by the plaintiff not only for his own benefit, but on behalf of other Negro citizens of South Carolina similarly situated. This procedure is entirely proper under Rule 23(a)(3) of the Federal Rules of Civil Procedure. Other Negroes have in the past sought admission to Clemson, and doubtless there are other qualified Negroes who will do so. These, as well as Gantt, are entitled to freedom from a racially discriminatory policy.

Accordingly, the issuance of an injunction will be ordered.

Reversed and remanded.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF SOUTH CAROLINA

ANDERSON DIVISION

CA/4101

HARVEY B. GANTT, a minor, by his father and next friend, Christopher Gantt, *Plaintiff*,

v.

THE CLEMSON AGRICULTURAL COLLEGE OF SOUTH CAROLINA, a public body corporate; *et al.*, *Defendants*.

Findings of Fact, Conclusions of Law and Opinion

This is an action by plaintiff, a nineteen year old negro resident of Charleston, South Carolina, against defendants, seeking a permanent injunction enjoining the defendants from denying him admission to The Clemson Agricultural College of South Carolina solely on account of his race.

The suit was commenced on July 7, 1962. On the same date the plaintiff filed a motion for preliminary injunction. The motion for preliminary injunction was heard on August 22, 1962, and denied on September 6, 1962. *Gantt* v. *Clemson Agricultural College of South Carolina*, 208 F. Supp. 416 (1962).

Plaintiff appealed from such Opinion and Order denying motion for preliminary injunction. After hearing arguments on the appeal, the United States Court of Appeals for the Fourth Circuit filed the following Order dated October 5, 1962: "Upon consideration of the briefs of the respective parties and the full arguments of their counsel on September 25, 1962, and October 4, 1962, on the appeal

of Harvey B. Gantt from the District Court's denial of his motion for preliminary injunction to secure his immediate admission to Clemson Agricultural College:

"Assurances having been given by counsel for the College that the case can be conveniently heard on the merits in the District Court at an early date, and upon his suggestion that no injunction issue pending such an early hearing; and,

"Since the appellant is now enrolled in the current term of Iowa State University, a school of his earlier selection; and,

"In the expectation that counsel for the parties will cooperate in applying to the District Court for a prompt trial, preferably within fifteen days hereof, so that any appeal will be ready to be heard not later than the first day of the January 1963 term of this court and finally concluded before the opening of the second semester of the College, about February 1, 1963, without obstacle to the appellant's matriculation at the beginning of that school semester, should he prevail,

"It is hereby ordered by the United States Court of Appeals for the Fourth Circuit that decision on the motion for preliminary injunction be withheld for the present."

In compliance with this Order of the United States Court of Appeals for the Fourth Circuit, attorneys for both plaintiff and the defendants requested an early trial, and on October 12, 1962, attorneys for the plaintiff filed a formal motion for a trial of the case on the merits.

This motion and plaintiff's pending motion to inspect all applications for admission to Clemson College for the years 1961-1962, were heard by me on October 17, 1962, at the hearing of which motions attorneys for the plaintiff stated that they would like three weeks within which to inspect such applications for admission to Clemson College. Also, on October 10, 1962, when I received a copy of the Order of the United States Court of Appeals, the rosters

of cases for the October terms of court had already been fixed and attorneys for the parties had been notified accordingly. This case could not, therefore, have been tried within fifteen days from the date of the Order of the Court of Appeals.

In order to provide an early trial of this case I advanced it on the docket ahead of all civil cases at the Anderson term of court, convening on November 19, 1962, in which division the above case was filed and was pending, and set it for trial on the merits on Monday, November 19, 1962, at three o'clock p.m.

The case was tried before me on the merits at Anderson, South Carolina, on November 19, 20, 21, 1962, at the conclusion of which attorneys for the parties agreed to waive oral arguments and to submit written briefs within five days after the receipt of the transcript of record.

At the outset of the trial plaintiff asked me to take judicial notice of certain Statutes and Acts of the State of South Carolina.[1]

[1] Act Number 860, Acts and Joint Resolutions of South Carolina, for 1948, establishing the South Carolina Regional Education Board; Section 22-201, Code of Laws of South Carolina, for 1952; Section 22-202, Code of Laws of South Carolina, for 1952; Section 22-3, Code of Laws of South Carolina, for 1952; Section 22-31, Code of Laws of South Carolina, 1952; Act 927, Acts and Joint Resolutions of South Carolina, for 1956, entitled "An Act to Provide for a Committee to Study and Report on the Advisable Course to be Pursued by the State in Respect to Its Educational and Public Facilities in View of the Nullification by the Federal Courts of the State Constitution Requiring the Establishment of Separate Schools for Children of the White and Colored Races"; Act Number 749, Acts and Joint Resolutions of South Carolina, for 1962, with particular reference to Section 67 of that Act, found on page 1846; all similar items in the appropriations of South Carolina for 1960-1961, 1960, 1959, and back to the inception of the two committees mentioned, the South Carolina School Committee and the South Carolina Regional Education Board.

These statutes indicate a legislative policy on the part of the State of South Carolina not to prohibit but to discourage integration of the races in its state-supported colleges. It does not follow, however, that a State college must admit a member of the negro race because he is a negro. See, *Briggs* v. *Elliott*, 132 F. Supp. 776 (1955). A negro cannot be denied admission because he is a member of the negro race nor can a white person be denied admission because he is a member of the white race. So, the question for decision in this case is, has the plaintiff been denied admission to Clemson College solely because he is a member of the negro race?

Prior to the decision in 1954 by the United States Supreme Court in the case of *Brown* v. *Board of Education*, 347 U. S. 483, 98 L. Ed. 873, 74 S. Ct. 686, the State of South Carolina provided for the education of its citizens upon a policy of racial segregation based on the belief and conviction that such a policy was not only legal but wise and would provide a better education for the boys and girls of both races. After that decision the people of South Carolina and the Legislature were confronted with the problem of adjusting to a new way of life in the field of education.

In 1955, the Legislature of South Carolina passed Acts which provide as follows: "§ 21-2. Transfer of pupil by court order to void appropriations. Appropriations of State aid for teachers' salaries, and all other school district, county and State appropriations for the operation of the public school system, shall cease and become inoperative for any school from which, and for any school to which, any pupil may transfer pursuant to, or in consequence of, an order of any court, for the time that the pupil shall attend a school other than the school to which he was assigned before the issuance of such court order."

"§ 22-3. Court order requiring admittance of pupil automatically close institution involved. All appropriations

for colleges and institutions of higher learning being made on the basis of racial segregation, the boards of trustees or other governing bodies of the University of South Carolina, The Citadel, The Clemson Agricultural College of South Carolina, Winthrop College, State Medical College, and South Carolina State College are each hereby directed to close its said institution upon any pupil being ordered admitted immediately to it by the order of any court, and to keep it closed while the pupil presents himself for admittance or until the court order is revoked."

"§ 22-3.1. Same, Consequential closing of South Carolina State College. If any one of the State supported institutions of higher learning designated in § 22-3, other than the South Carolina State College, shall be forced to close as the result of a pupil being admitted by any court order, the South Carolina State College shall likewise be closed until such time as the other institution is opened."

These Acts of the Legislature do not make it unlawful for the Board of Trustees or the administration of any college to admit a negro student. The statutes are directed against the admission by order of court. If the administration or the Board of Trustees should admit voluntarily any negro, including the plaintiff, as a student of Clemson College, it would be lawful and would not be contrary to any law of the State of South Carolina. It would not require the closing of Clemson College or any other State-supported college.

In addition to the statutes above set forth, the Legislature passed an Act which provides for certain scholarships. One of the Rules and Regulations of the South Carolina Regional Education Board provides in reference to scholarships and for study at out-of-state institutions, as follows: "Scholarships may be granted to study courses which are not offered at South Carolina State College in Orangeburg, but which are offered at state-supported institutions within the State of South Carolina which are not available to Negro students."

The plaintiff in this case took advantage of this law providing money for scholarships and applied to the State Regional Board of Education for funds with which to attend Iowa State University at Ames, Iowa. It is true that this Rule promulgated by the Board mentions race, but it was evidently passed for the purpose of encouraging a member of the negro race voluntarily to go to a college outside of the State instead of entering a college in South Carolina where only white students were attending. It does not and could not legally under the federal decisions make it unlawful for him to attend any State-supported institution in South Carolina, provided he met the entrance requirements.

The Legislature of South Carolina is in favor of a policy of segregated schools as far as it may do so in conformity with the law as it now exists. There is no statute now in existence which makes it illegal for the Board of Trustees or its administrative officers to admit the plaintiff as a student at Clemson College but the Acts of the Legislature indicate a policy seeking to discourage the mixing of the races in the colleges in South Carolina. If the plaintiff, or any other negro, should file an application and meet the requirements for admission, he could not legally be denied admission because of his race, and in such case it would be the duty of this court to order his admission.

With this in mind, I come now to the real issue involved in this case: Has the plaintiff been denied admission to Clemson College, and if he has been, was he denied admission solely because he is a member of the negro race?

The plaintiff filed an application card with Clemson College in January, 1961, indicating an interest in enrolling in architecture at Clemson College for the semester beginning in September 1961. Though he had been furnished a copy of the college catalog and had been advised, "Please note carefully the entrance requirements as listed in the catalog" he did not attempt to file the required basic information

until about August 30, 1961.[2] The only information he then furnished was the result of tests given by College Entrance Examination Board of Princeton, New Jersey. He did not furnish the information required by the College catalog. This application of the plaintiff for entrance in 1961 was cancelled on August 31, 1961, along with all applications of transfer students, including about fifty from white transfer students, because of the lack of time for consideration prior to the entrance date, and plaintiff and the others were mailed a form letter of that date so notifying them. Plaintiff understood the letter of August 31, 1961, as a cancellation and enrolled and returned to Iowa State University upon receipt of it, and continued and completed his studies there for the college year 1961-1962.[3]

On December 6, 1961, plaintiff mailed another application for admission to Clemson College. At this time he was already enrolled in Iowa State University until the end

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[2] Clemson College had the legal right to prescribe and enforce reasonable rules and regulations in which there is no racial discrimination for the admission of applicants to Clemson College. *Carson* v. *Warlick*, 238 F. 2d 724 (CA 4, 1956); *Ward* v. *Regents of University System of Georgia*, 191 F. Supp. 491 (N.D. Ga., 1957); *Dixon* v. *Alabama State Board of Education*, 186 F. Supp. 945 (M.D. Ala., 1960); *Hunt* v. *Arnold*, 172 F. Supp. 847 (N.D. Ga., 1959).

[3] The fall semester was to begin at Clemson on September 8, 1961. (Tr. 168) Enrollment had increased and the burden of processing applications had increased at least in like proportion. (Tr. 169) At the end of August, it became very clear that time would not permit the processing of all pending applications from transfer students, and the decision was made to cut off transfer applications on August 31, 1961. This was a step that had been recommended by the Director of Admissions for several years. (Tr. 228) Based on this experience a cut-off date was established in advance for 1962. (Pl. Ex. 29; Tr. 190) This was applied only to transfer applicants who, if eligible to attend Clemson, remained eligible to return to the school last attended, and about fifty applicants were notified by the form letter of August 31, 1961.

of the college year 1961-1962. This is the application in question in this controversy. I should, therefore, examine the facts from the time this application was filed until this action was commenced.

In this application in answering the question "Date you desire to enter Clemson" the answer is "January 1962". In his letter forwarding this application plaintiff said "In the event this application is not processed in time for the beginning of the next semester at Clemson, please consider it an application for the next ensuing and subsequent semester or school term and that it be considered a continuing application." The plaintiff further stated in this letter, "I will cause a copy of my transcript of work to be completed during the present period at Iowa State University as soon as it is ended. I will also obtain a statement from the appropriate officials of Iowa State University concerning my eligibility to return to that institution." None of this data was received at Clemson until after June 13, 1962, after plaintiff had completed his courses at Iowa State University in 1962.

On April 28, 1962, plaintiff wrote a letter inquiring as to the status of his application.[4] In reply to this letter the Registrar of Clemson College on May 21, 1962, sent the plaintiff a catalog of Clemson College and advised him that the College "cannot act on any application until the necessary information has been submitted in full."

Upon return from Iowa State University the plaintiff visited the office of the Registrar on June 13, 1962, to make

[4] When this letter was written plaintiff knew that he had not furnished the transcript requested and required. He knew that Clemson College required all transfer applicants to furnish a satisfactory transcript of work at the college last attended. (Tr. 12, Pl. Ex. 29) He had been informed, "When all material required has been submitted and processed, you may, under established admission policy be called for personal interview before final decision is made. The interview will not be scheduled until your application is otherwise complete." (Pl. Ex. 13)

inquiry about his application. His transcript of grades and necessary data had not been received by Clemson College at that time. On June 26, 1962, plaintiff sent the following telegram to the Registrar of Clemson College: "Am informed transcript of my grades forwarded to your office June 13, 1962. request my application to Clemson be favorably considered and I be given interview immediately reply within 48 hours please". If this transcript were forwarded from Iowa State University on June 13, 1962, the day plaintiff visited Clemson College, it certainly could not have arrived until a day or more after that date.

Complying with plaintiff's request that he be given a "reply within 48 hours", the Registrar sent a telegram to the plaintiff on June 28, 1962, as follows: "Retel June 26 Transcript received Your application along with all others pending completion is being processed in manner we advised during your visit to this office on June 13 You will be advised date for interview as soon as other details relative to your application have been completed."

Within four days after the Registrar replied to plaintiff's telegram, the plaintiff's application was started on its course to be duly processed. In fact, it appears that his application was to receive some priority because of plaintiff's demanding telegram. Plaintiff's application was sent to the Dean of the School of Architecture. On July 2, 1962, six days after plaintiff's telegram, the Dean of the School of Architecture addressed the following letter to the plaintiff: "The transcript of your record at Iowa State University has been handed to the School of Architecture for analysis and evaluation. As, in every case of transfer, there is some difficulty in determining the equivalence of courses at another school with courses required for a degree in Architecture at Clemson. This problem is made more difficult by the fact that Iowa State University is on the quarter system and we must convert quarters of work into semesters of work.

"To assist us in the evaluation we must see a portfolio of your work in architectural design and drawing at Iowa State University with an indication of the duration of the exercises submitted. You may submit any other creative work you care to show. The more complete this portfolio is the better our evaluation can be.

"At the time you submit this to us, or as soon as convenient thereafter, we recommend that you come to Clemson for a conference. This conference will have to do with the standards and procedures of the School of Architecture and will not be a substitute for the pre-acceptance interview provided by college admissions policies. I will be away from the campus from time to time during the summer. Please write or telephone for an appointment before coming."

Clemson College could not act intelligently on the application and in plaintiff's interest on his application on July 2, 1962. The Dean of the School of Architecture testified that further investigation of the application was important and necessary: (a) To assess the aptitude of the applicant for the pursuing of Architecture as a career; (b) To determine the capability and real interest of the applicant and assess his creativity; (c) To determine the proper level of placement of the applicant if he should be accepted. It would determine whether the plaintiff would likely have to go four more years to Clemson College as against three more years at Iowa State University for a degree in architecture. This should have been a matter of real concern to the plaintiff.

The college processed all of the hundreds of applications for admission to its school during the summer months and did not close the decision on applications until August 31, 1962, which gave each applicant time to make arrangements to enter the school term in the fall of 1962.

The letter from the Dean of the School of Architecture gives every indication of his desire to cooperate and assist

the plaintiff in the problems involved in transferring from one school of architecture to another. Plaintiff should have been interested in the matters set forth in the Dean's letter such as the determination of equivalent courses at another school with courses required for a degree in architecture at Clemson, setting forth why, in plaintiff's particular circumstances, such a determination would be more difficult. The Dean suggested that the plaintiff write or telephone for an appointment so that the Dean would be sure to be in his office when plaintiff appeared for the conference suggested. The Dean's letter gives every assurance that the college would consider plaintiff's application upon its merits. This letter was written in conformity with the provision in the catalog governing the admission of transfer students.

In connection with an application for transfer from another college to Clemson, the Clemson College Record, 1960-1961, and 1961-1962, provides that the applicant shall furnish "an official transcript of his record, including entrance credits", and also that "work that has been completed in other colleges with a grade one letter grade higher than the lowest passing grade will be carefully considered and evaluated in terms of equivalent courses in the curriculum at Clemson selected by the student."

When the Dean of Architecture received plaintiff's application and transcript, it became his duty to "consider and evaluate in terms of equivalent courses in the curriculum selected" by the applicant, that is, the School of Architecture. This evaluation had to be made, regardless of whether applicant was white or Negro. There was no delay on the part of the Dean of Architecture. The Dean had a right to see as a part of "an official transcript of his record" a portfolio of his work in architectural design and drawings at Iowa State University with an indication of the duration of the exercises submitted. The Dean invited plaintiff to come to Clemson for a conference and bring this material with him. He also suggested that plaintiff make the appoint-

ment by telephone, indicating clearly that he was ready to act. The college had the right and the duty to make the evaluation from a complete transcript of his record and should not be compelled to admit him or any other student, white or Negro, without it.

Instead of telephoning or writing the Dean of Architecture or making any other effort to comply with the request of the administrative authorities, plaintiff, on July 7, 1962, filed a complaint against the college in which he asked this court to order his admission as a student at Clemson College. This complaint significantly was dated and verified June 30, 1962.

If such a procedure should be allowed to prevail and all applicants should be allowed to file an application for admission to the college in June, and then during the first week in July should file suit against the college demanding that the court order his admission, the school would be put in a state of chaos.

On July 13, 1962, several days after the suit had been commenced, plaintiff wrote the Dean of Architecture in reply to his letter, asking the Dean to advise him "whether, in view of my pending suit, you will wish me to comply with your letter."

At the time this action was commenced Clemson College had not refused to admit plaintiff as a student to Clemson College on account of his race or on account of any other facts charged against the college.

The college has the legal right to process plaintiff's application along with all others. Plaintiff's application is not the only one to be considered by a college having a student body of between four and five thousand students. No court has held that an applicant must be admitted to a college solely upon the ground of race. Colleges have the right and the duty to pass upon each application submitted on its merits.

Plaintiff's application was not only for admission to Clemson College but was for the transfer from one college to another. In permitting a student to transfer from one college to another, there are many matters to be considered by the school before accepting an application for transfer. If the plaintiff is seriously interested in securing a good education in the field of architecture he should have been glad to secure and consider the wise counsel of the Dean of Architecture of a great school like Clemson College. The Dean may have been able to convince the applicant that his desire to transfer would be very detrimental to his progress, or the Dean may have advised him that it was best for him to make the transfer.

The members of the Board of Trustees and the administrative officials of Clemson College deny that they have discriminated against the plaintiff on account of his race and they assert affirmatively that his application has been consistently processed and handled in the same manner and by the same standards as all other similar applications received by the College.

The inspection of the applications for admission to Clemson College by the attorneys for plaintiff did not disclose any discrimination against the plaintiff because of his race. It involved only one case of a transfer applicant whose application was treated differently from that of the plaintiff and about fifty other white transfer applicants. This applicant was a woman and was admitted in September, 1961, as a transfer student from the University of Florida. This applicant was treated differently from the fifty white transfer applicants for admission in September, 1961, whose applications for admission were denied. The evidence shows that the college had good reason for her admission. It is not denied by the college that plaintiff's application file was kept in the record vault of the college rather than in a file cabinet and the letters to the plaintiff were written not by the Director of Admissions or by the Admissions Supervisor, but were written by their immedi-

ate superior the Registrar of Admissions. The file was kept in the vault for safe-keeping. In my opinion the administrative authorities had reason to assume difficult problems might arise when the plaintiff was admitted as has happened in other parts of the country. The college authorities had to anticipate all the contingencies that might occur. This is unfortunate but cannot be ignored. These circumstances indicate a purpose to admit him as much as a purpose to deny admission. The handling of the correspondence by the Registrar in the Department of Admissions served as an assurance that the application would be handled in all respects in accordance with existing regulations.

If a white person had pursued exactly the same course seeking a transfer from Iowa State University to Clemson College that the plaintiff has pursued in this case, I should not and would not enter an order to compel Clemson College to admit him.

The burden is upon the plaintiff to prove the material allegations of his complaint by the greater weight of the evidence. Plaintiff's case is based upon circumstantial evidence. Plaintiff has not proved by the greater weight of the evidence that the circumstances in this case point to the conclusion that the plaintiff has been denied admission to Clemson College solely because he is a member of the negro race. The direct testimony of members of the Board of Trustees of Clemson College, the President and Admission Officers of Clemson College, testified under oath that plaintiff has not been denied admission because of his race. I cannot assume that these officers of Clemson College, whom I know to be honorable citizens of this State, would testify falsely to prevent plaintiff's admission to Clemson College.

Under the evidence and circumstances in this case plaintiff has failed to prove the material allegations of his complaint by the greater weight of the evidence; he has failed

to comply with the rules and regulations for admission to Clemson College; he has failed to complete his application; he has not been denied admission to Clemson College on any ground; he has not been denied admission to Clemson College on account of his race. The plaintiff, therefore, is not entitled to the injunctive relief he seeks in this action. The complaint in this action should be, therefore, dismissed with costs and judgment entered for the defendants.

Having reached this conclusion it is not necessary for me to determine any other question that may be involved in this controversy.

It is, therefore, ORDERED, That the complaint be dismissed with costs and judgment entered for the defendants.

C. C. Wyche /s/
C. C. WYCHE
United States District Judge

Dated:

Spartanburg, South Carolina,
December 21, 1962.